

## UPDATE ON TRIBAL JURISDICTION

Montana-Wyoming Tribal Court Judges association

Whitefish, Montana

Brenda C. Desmond  
Standing Master, District Court Fourth Judicial District

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- I. Review of National Farmers Union Insurance Cos. et al. v. Crow Tribe of Indians et al., 471 U.S. 845; 105 S. Ct. 2447; 85 L. Ed. 2d 818; Argued April 16, 1985, Decided June 3, 1985.

A. The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and therefore is a "federal question" under 28 U.S.C. § 1332 that provides the basis for federal jurisdiction.

B. As a general matter, and unlike the situation in criminal law, (Oliphant) Indian tribes have not been implicitly divested of "the power to resolve disputes arising within the territory governed by the Tribe," an attribute of inherent tribal sovereignty.

C. Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

D. "We believe that examination should be conducted in the first instance in the Tribal Court itself. "

E. Supreme Court Rationale for Exhaustion Rule:

(1) "Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose

jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.”

(2) “Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.”

(3) “Exhaustion of tribal court remedies, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.”

F. Significant United States Supreme Court cases interpreting National Farmers Union:

1. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed. 2d 10 (1987).

2. Strate v. A-1 Contractors, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed. 2d 661 (1997).

3. El Paso Natural Gas Co. v. Neztosie, 526 U.S. 473, 119 S.Ct. 1430, 143 L.Ed. 2d 635 (1999).

4. Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed. 2d 398 (2001).

G. Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed 2d 493 (1981). Federal court interpretation of the following two Montana rules and their application beyond the regulatory context continues to evolve. "First, a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements....Second, a tribe may...exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana at 565.

- II. Tribal Court Civil Jurisdiction: The federal courts continue to refine (and some might say re-frame) the interpretation of Montana v. U.S., as it applies in the tribal court context. Yet, while the extent of federal law limits on tribal court jurisdiction may be unclear at times, the role of the tribal judges in determining tribal court jurisdiction remains clear and central to the future of tribal justice systems.

A. Ninth Circuit

1. Ford Motor Company v. Todecheene, 394 F.3d 1170 (2005). Navajo Tribal Court lacked jurisdiction over a products liability action arising out of a car accident that occurred on tribal trust land.
2. Smith v. Salish Kootenai College, 378 F.3d 1048 (2004). Confederated Salish and Kootenai Tribal Court lacked jurisdiction over a case arising from a vehicle accident involving a member of the Umatilla Tribe attending Salish Kootenai College.

B. Tribal Courts

1. In Re the Matter of L.H., Fort Peck Court of Appeals, No 417 (2003). Importance of written findings for appellate review.
2. Nelson v. Pfizer, Navajo Supreme Court SC-CV-01-02 (2003). Court declined to apply Montana, regardless of status of reservation land. (Contrast Ford)
3. Smith v. CSK College: Confederated Salish and Kootenai Tribal Court of Appeals: AP 99-227CV (2004). Court of Appeals found tribal court did have jurisdiction.

III. Indian Child Welfare Act

- A. In the Interest of J.S.B., Jr., Minor Child, 691 N.W. 2d 611 (S.D.2005). Trial Court erred in its ruling that ICWA's requirement to provide active efforts to prevent the breakup of Indian families is overridden or excused by the provisions of the Adoption and Safe Families Act, ("ASFA"). The Court stated that under AFSA, enacted in 1997, "'reasonable efforts'" to reunify a family are not required before termination of parental rights when a parent has a pattern of abusive or neglectful behavior constituting an aggravated

circumstance...on the other hand, ICWA, provides special rules for the needs of Indian children and families.” When in conflict with AFSA, the provisions of ICWA control.

B. In Re the Matter of A.G., 2005 MT 81 (2005) The *Guidelines for State Courts; Indian Child Custody Proceedings*, B.1.(a), 44 Fed.Reg. 67,586 (1979), require that when a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court must seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. The Supreme Court reversed the District Court's determination that children were not Indian children within the meaning of ICWA. The District Court had based its determination solely on the testimony from the social worker and the letters from the Tribes casting the children's Indian status into question.

C. In the Matter of M.R.G., 2004 MT 172; 322 Mont. 60; 97 P.3d 1085 while the District Court did not specifically state the beyond-a-reasonable-doubt standard of proof in its order, it did apply that standard of proof in this case; District Court decision affirmed.

#### IV. Criminal Cases

A. Spears v. Red Lake Band of Indians, 2005 U.S. Dist. LEXIS 5686 (D.C. MN 3-30-2005). For purposes of tribal court sentencing limits under the Indian Civil Rights Act, any “one offense” means a single criminal transaction Otherwise, tribal court defendants would be routinely exposed to serious sentences for minor crimes without guaranteeing them all their basic constitutional rights separate crimes arising from a single criminal episode should normally be treated as a single offense for sentencing purposes (But see, Ramos v. Pyramid Tribal court, 621 F. Supp. 967 (D. Nev.1985) for a different result.

B. United States v. Vernon Bad Marriage, 392 F.3d 1103 (2004). The Ninth Circuit reversed the sentencing judge's upward departure from the federal sentencing guidelines where most of Defendant's uncounted prior convictions were not violent and stemmed from serious alcohol abuse. “Although alcohol abuse cannot excuse criminal behavior, we cannot ignore the presence of this factor in determining the appropriateness of an enhanced sentence.”

#### IV. Law Review Articles

A. *Glacier National Park and the Blackfoot Nation's Reserved Rights: Does a Valid Tribal Co-Management Authority Exist?* 29 Am. Indian L. Rev. 151, 2004/2005. Note, Curt Sholar.

B. *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians* 19 BYU J. Pub. L. 1, Robert McCarthy.